ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CACR07-480

FEBRUARY 20, 2008

JERRY MILLER APPELLANT	APPEAL FROM THE UNION COUNTY CIRCUIT COURT [NO. CR-2006-295-4]
V.	HON. CAROL CRAFTON ANTHONY, CIRCUIT JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Jerry Miller appeals his convictions on charges of possession of methamphetamine with intent to deliver, manufacture of methamphetamine, possession of drug paraphernalia with intent to manufacture methamphetamine, and first-degree forgery. He was sentenced as a habitual offender to terms of ten years, ten years, six years, and six years respectively, to be run consecutively for a total of thirty-two years in the Arkansas Department of Correction. On appeal, appellant challenges the sufficiency of the evidence supporting his forgery conviction. He also argues that the circuit court erred by denying his motion to suppress, by allowing evidence of prior bad acts, and by running the sentences consecutively. We affirm.

On March 3, 2006, a confidential informant (C.I. #165) met with Union County Sheriff's Department investigators Brent Reaves and David Gates regarding appellant, whom C.I. #165 stated had illegal narcotics in his residence and was making counterfeit money for the purpose of selling to individuals for authentic currency. C.I. #165 stated that he knew an individual who would be willing to work undercover and go to appellant's residence and obtain counterfeit money from appellant. That same day, C.I. #165 and an unknown white male met with investigators at a predetermined location for an interview, after which the investigators signed up the individual as a confidential informant (C.I. #174). At the conclusion of the meeting, C.I. #174 was given forty dollars of undercover drug-buy money.

At 12:49 p.m., C.I. #174 left the meeting location followed by C.I. #165 and the investigators. He arrived at appellant's residence a few minutes later and left shortly thereafter with appellant in a silver car belonging to appellant. C.I. #174 and appellant had been gone approximately five minutes when an individual known by investigators and C.I. #165 to be Hank Wedgeworth, a narcotics dealer, arrived at appellant's residence. He left the residence and was followed by the investigators to a local Pizza Inn. The investigators parked nearby and watched Wedgeworth go inside the Pizza Inn. He returned a short time later with four white males, including appellant and C.I. #174, and a white female.

Investigators pulled up and made contact with the suspects, at which time one of the suspects, Rusty Novack, fled on foot. Investigator Reaves quickly apprehended Novack and arrested him for fleeing. Novack gave investigators a statement that he had seen appellant with counterfeit money that appellant had made at his residence.

Investigator Gates made contact with appellant and Wedgeworth by the driver's side of Wedgeworth's vehicle. Investigator Gates observed a stick with a metal end on one end and a leather strap on the other end in the vehicle. Investigator Gates placed both appellant and Wedgeworth under arrest for the weapon, at which time Wedgeworth told Investigator Gates that there was a methamphetamine-smoking pipe located under the driver seat. Investigator Gates retrieved the item and also discovered a small, clear, plastic baggie that contained suspected methamphetamine.

Deputy Murphy made contact with Anthony Cameron, who was in possession of a clear-plastic baggie containing suspected methamphetamine. During his interview with investigators, Cameron indicated that he had been purchasing methamphetamine from appellant, generally Thursday through Sunday, as recently as March 1, 2006, and that purchasing drugs was the only reason that he ever went to appellant's residence.

Investigator Reaves also interviewed appellant's girlfriend, Faith Halligan, at the scene, and she indicated that on the previous afternoon, she, appellant, Novack, Robert Turner, and Melissa Turner produced a counterfeit one-hundred-dollar bill at appellant's residence and took it to the Economy Inn where the managers checked the bill and agreed to assist them in laundering the counterfeit money.[1] Novack corroborated Halligan's account of the

[1]Halligan indicated this was because they dealt in large amounts of cash at the motel.

Economy-Inn meeting and stated that appellant had approached the managers and further fleshed out the plan to try to pass the counterfeit bills through the bank.[2]

C.I. #174 reconnected with Investigator Gates shortly after the other suspects were arrested and stated that he witnessed narcotics and drug paraphernalia located at appellant's residence when he was there earlier in the day. Based on the entirety of the information obtained from C.I. #174 and the other suspects from the Pizza-Inn incident, a search warrant was issued for appellant's residence, and the warrant was served and executed that same afternoon at approximately 4:45 p.m. Various items of drug paraphernalia, baggies of suspected methamphetamine, paper items suspected to be part of a counterfeit money production, and mail containing appellant's name and address were retrieved pursuant to the search.

Prior to trial, appellant filed a motion to suppress all the evidence seized from his residence. At the hearing, the State relied upon the affidavit for the warrant; however, appellant elicited testimony from Halligan, Cameron, and Novack, all of whom denied their previous statements to investigators. The circuit court denied the motion, finding there had been probable cause to issue the warrant.

A jury trial was held on October 6, 2006. At the close of the State's case in chief, appellant moved for a directed verdict, stating:

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[2]On Wednesday, March 8, 2006, investigators went to the Economy Inn and interviewed the managers, April Pickett and Stephen Byrd. They both corroborated Halligan's and Novack's accounts of appellant trying to engage them in the counterfeit scheme.

> Motion for a judgment as a matter of law based on the lack of the evidence to show that my client had committed the crimes alleged as far as manufacturing. The forgery, possession with intent to deliver, possession of drug paraphernalia.

The motion was denied, and appellant failed to renew his motion until after the pronouncement of guilt and poll of the jurors. That belated renewal was also denied. The jury convicted appellant on all four counts, and he was sentenced as previously set forth. A judgment and commitment order was filed on October 23, 2006, and appellant filed a timely notice of appeal on November 14, 2006.

I. Sufficiency of the Evidence Supporting the Forgery Conviction

We first consider whether appellant's sufficiency argument is preserved for appeal. Arkansas Rule of Criminal Procedure 33.1(a) provides that in a jury trial a motion for a directed verdict must be made at the close of the evidence offered by the prosecution and again at the close of all evidence. The rule further provides that the failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict. Ark. R. Crim. P. 33.1(c). Appellant moved for a directed verdict at the close of the State's case in chief, and that motion was denied. He failed to renew the motion at the close of all the evidence, waiting until after the pronouncement of guilt and poll of the jurors, and that renewed motion was also denied. Therefore, as related solely to the requirements of Rule 33.1, his challenge to the sufficiency of the evidence is not preserved for our review. *See Eastin v. State*, 370 Ark. 10, __ S.W.3d __ (2007).

Additionally, appellant's initial motion for directed verdict was not sufficiently specific to preserve a challenge to the sufficiency of the evidence regarding the forgery. His above-quoted motion merely recited the four charges against him and stated generally that there was a "lack of evidence" to show the crimes were committed. Appellant failed to state which element was not proven, and a general motion is not sufficient to preserve the argument for appeal under Rule 33.1. *See Pinell v. State*, 364 Ark. 353, 219 S.W.3d 168 (2005). Accordingly, we are prevented from reaching the merits on this issue.

II. Denial of Motion to Suppress

An appellate court conducts a de novo review of a circuit court's denial of a motion to suppress based upon the totality of the circumstances, reviewing findings of historical facts for clear error and giving due weight to inferences drawn by the circuit court. *See State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003). When determining whether to issue a search warrant, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including a confidential informant's reliability and basis of knowledge, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994). If the affidavit, when viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure may be found in a particular location, any failure to establish the veracity of a confidential informant is not fatal. *See Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002); Ark. R. Crim. P. 13.1 (2006). In assessing the existence of probable cause on appeal, the review is liberal rather than

strict. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004). Also, our review of probable cause for the issuance of a warrant is confined to the information contained in the affidavit, and our duty is simply to ensure that the magistrate had a substantial basis to conclude that probable cause existed. *See George v. State*, 358 Ark. 269, 189 S.W.3d 28 (2004).

Appellant argues that there is no basis in fact or law for the proposition that the search warrant was obtained pursuant to information acquired by virtue of a valid arrest because the initial seizure of appellant at the Pizza Inn parking lot was undertaken without probable cause, based entirely on suspicion and conjecture. Also, he contends that the affidavit contained absolutely no information concerning the veracity or reliability of the confidential informants and other persons whose information was utilized in preparing it; moreover, the officer signing the affidavit and participating in the search knew that it contained information that was less than truthful and misleading. He claims that any observation of potentially improper conduct by the investigators at the Pizza Inn certainly did not give rise to any reasonable belief that criminal activity or evidence of a crime would be present at appellant's residence, which is an entirely different location.

Section (b) of Rule 13.1 othe Arkansas Rules of Criminal Procedure states in relevant part:

> (b) The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. . . . An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular

> place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

Appellant maintains that all the evidence obtained by the police in this matter was obtained as a result of and subsequent to the initial stop and arrest of the various suspects at Pizza Inn. He argues that the police approached them with guns drawn and placed them in handcuffs, far exceeding the acceptable parameters of a simple stop. He argues that the officers failed to mention the manner of that initial seizure in the affidavit because they had no probable cause to either make the arrests or believe that seizure at gunpoint was warranted. He contends that because there was no probable cause for the arrests based upon the facts in the affidavit, all information obtained subsequent to the arrest should have been suppressed. He alleges that the only fact shown in the affidavit is that, at the time of the arrest, he was in the company of various individuals, some of whom had questionable reputations with the police.

The State counters, and we agree, that the affidavit did meet the requirements for the issuance of a search warrant under Rule 13.1. Confidential Informants #165 and #174 helped initiate the investigation based upon their prior dealings with appellant. Shortly after arriving at appellant's residence with buy money, C.I. #174 and appellant left in appellant's vehicle. Investigators and C.I. #165 then observed a known narcotics dealer, Wedgeworth, arrive at appellant's house before proceeding to the Pizza Inn. He went inside and returned to the parking lot with a female and four males, including appellant and C.I. #174. The State details the facts previously set forth above and contained in the affidavit with respect to the

information obtained from the individuals involved in the Pizza Inn altercation. Additionally, C.I. #174 told the investigators that he personally observed narcotics and drug paraphernalia at appellant's residence when he was there earlier that same day. Other information obtained from Cameron and Halligan, although somewhat related to the Pizza Inn incident, was not directly related to appellant's arrest. The State argues that these statements from appellant's "associates" that are named in the affidavit[3], along with the drugs, paraphernalia, and weapon seized at Pizza Inn, provided enough information to support the issuance of a warrant.

Under the applicable standard of review, when viewed as a whole and including the corroborating statements from C.I. #174 and Cameron about their individual observations of drugs, paraphernalia, and money at appellant's residence within the two days prior to the issuance of the warrant, the information in the affidavit provides some indication of reliability. Paired with the direct observations of investigators regarding Wedgeworth's coming and going from appellant's residence, which was consistent with appellant's residence being utilized as a point of distribution for methamphetamine, we hold that there is sufficient indicia of reliability. The affidavit gives a level of detail that otherwise forms a substantial basis for a finding of reasonable cause that items subject to seizure were likely to be found in appellant's residence. *Abshure*, *supra*.

Although appellant also contends that Investigator Reaves knew that the affidavit contained untruthful, misleading information, we hold that there is no basis in his argument

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[3] *See Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001) (stating that an affidavit for a search warrant need not contain facts establishing the veracity and reliability of nonconfidential informants).

as to the accuracy of the information contained therein. At the suppression hearing, Halligan and Cameron testified that the affidavit was untrue, but each was impeached with his or her own previous statements to the police, which supported the contents of the affidavit. Determinations regarding credibility in suppression hearings are left to the circuit court. *See Yarbrough v. State*, 370 Ark. 31, __ S.W.3d __ (2007). Clearly, the circuit court did not believe the testimony provided by appellant's witnesses at trial. Additionally, appellant failed to prove by a preponderance of the evidence that Investigator Reaves knowingly and intentionally, or with reckless disregard for the truth, omitted facts from or added false information to the affidavit. Accordingly, his argument under *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999), must fail. We affirm on this point as well.

III. Testimony on Prior Bad Acts

With regard to the standard of review for evidentiary rulings, we have said that trial courts have broad discretion and that a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *Travis v. State*, __ Ark. __, __ S.W.3d __ (Dec. 6, 2007). Rule 404(b) of the Arkansas Rules of Evidence states the following:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence offered under Rule 404(b) must be independently relevant, thus having a tendency to make the existence of any fact that is of consequence to the determination of the action

more or less probable than it would be without the evidence. *See Cook v. State*, 345 Ark. 264, 45 S.W.3d 820 (2001). It is a general rule that proof of other crimes or bad acts is never admitted when its only relevance is to show that the accused is a person of bad character. *Spohn v. State*, 310 Ark. 500, 837 S.W.2d 873 (1992).

Appellant argues that the circuit court erred in allowing the State to elicit testimony about a fire that occurred approximately two years before the events related to the current charges. Bill Lewis, who was one of the confidential informants (C.I. #174), testified that it was his understanding, based upon a newspaper article that he had read, that appellant had been burned when a methamphetamine lab caught on fire. Appellant's counsel objected[4] and moved for a mistrial, or alternatively a jury instruction, but the objection was overruled and the motion denied. The circuit court stated that Lewis could not testify about anything he saw in the newspaper article but could testify about what he had seen or had been told. Additionally, the circuit court admonished the jury, upon request of appellant's counsel, to disregard anything that was contained in the newspaper article. Lewis then proceeded to testify regarding his personal observations of appellant cooking methamphetamine between February 2005 and June 2005, at which time appellant objected and was again overruled. Appellant asserts that this prejudicial testimony regarding an alleged prior bad act was in no way relevant to the present case.

[4]Appellant's counsel argued, in part, that this evidence, if brought up at all, should have been raised on direct examination and not as rebuttal evidence.

Appellant contends that he neither put his character at issue nor took the stand to claim that he was not involved in manufacturing methamphetamine. He reasons that the State attempted to meet its burden of proving the manufacturing charge against him, at least in part, by showing that he had manufactured drugs in the past and injured himself in the process. He claims that such evidence is not intended by Rule 404(b), whether in the State's case in chief, or in rebuttal. Appellant maintains that Lewis's testimony did not prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but rather was introduced for the purpose of convincing the jury that appellant was a person of bad character or at least had been in the past. He claims it was reversible error to allow such evidence to be introduced.

The State contends, and we agree, that appellant failed to preserve his specific Rule 404(b) argument, and improperly raises it for the first time on appeal. *See London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003). Further, appellant received the relief requested with respect to Lewis's testimony, specifically an admonition to the jury. Accordingly, he is not entitled to any relief on appeal. *See Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004).

Additionally, the only objection made regarding Lewis's testimony regarding appellant's learning to cook methamphetamine, being treated at a burn center in Dallas, and being called "Fire Marshall Fred" as a joke due to the cause of the burns, was that it was hearsay. The hearsay objection cannot be reached by this court because he has abandoned the argument. *See Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004). After the hearsay objection was overruled, Lewis continued to testify in detail about what appellant told him about the fire

without further objection from appellant's counsel. Appellant has changed his argument on appeal; accordingly, the issue is not preserved for our review.

Alternatively, while appellant challenges Lewis's testimony regarding the previous fire, he fails to mention that the circuit court also allowed the State to question appellant's mother as to why the gas stove in his residence had not been connected and whether that was related to a previous methamphetamine-lab fire that occurred when appellant was cooking methamphetamine. Appellant's mother, Audry Miller, denied that there had been a drug-related explosion in appellant's residence and stated she did not know if the fire occurred when he was trying to "make" methamphetamine. Additionally, appellant failed to challenge a question asked to one of his own witnesses, Rusty Novack, as to whether he knew appellant "when he caught himself on fire." Novack explained that he did know appellant when he caught himself on fire, and that although he was not there, it was his understanding that the cause of the fire was that appellant was cleaning his kitchen counter.

The State maintains that, when Lewis took the stand as a rebuttal witness, he was testifying to rebut the explanations provided by Miller and Novack. As to the appropriateness of the rebuttal testimony, we hold that Miller and Novack brought the issue into evidence, making it a proper issue for the State to rebut.

IV. Consecutive Running of Sentences

We have stated that a party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the

instruction. *Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006). We will not reverse a trial court's decision to give an instruction unless the court abused its discretion. *Id.*

Appellant argues that the circuit court erred in presenting a jury instruction that mentioned only consecutive sentencing rather than a less prejudicial one that also mentioned concurrent sentencing. The jury instruction that was presented was as follows:

> You have convicted [appellant] of more than one offense. And you may sentence [appellant] to a term of imprisonment on each offense. If you sentence [appellant] to more than one term of imprisonment you will make, also make a recommendation that the two terms of imprisonment be consecutive. A sentence to be, to, a sentence to consecutive terms of imprisonment means that the terms of imprisonment will be added together to determine the total term of imprisonment.
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> You are advised that a recommendation by you the terms of imprisonment be consecutive will not be binding on the court.

The jury returned with four separate sentences and a recommendation that they run consecutively. Appellant's counsel moved that they run concurrently, to which the circuit court responded: "No, Mr. Plouffe. That's a hard decision when we ask a jury to be up here and spend their time and they wrestle with it. I am inclined to accept what they recommend."

Appellant does not contend that the instruction given was in incorrect statement of the law, but rather that it was an incomplete statement of the law. He claims that it was misleading to focus only on consecutive sentencing when the jury also had the option of recommending that the sentences run concurrently, and he points out that the presumption, in fact, is that they run concurrently.

Additionally, appellant maintains that the circuit court failed to exercise any independent consideration as to his request that the sentences be run concurrently. Arkansas Code Annotated section 5-4-403 (Repl. 2006) provides in relevant part:

> (a) When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively.
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> (d) The court is not bound by a recommendation of the jury concerning a sentencing option under this section.

We have stated that in making the decision between concurrent and consecutive sentences, the trial judge should make it clear that it is his or her discretion being exercised when entering the sentences and not the jury's. *See Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985). Additionally, there must be an exercise of judgment by the trial judge, and not a mechanical imposition of the same sentence in every case. *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980).

Appellant contends that in the instant case, there is nothing in the record to indicate that the circuit court was exercising the requisite discretion when entering the sentences. He argues that the judge's comments clearly suggest that she was leaving the decision entirely up to the jury and was not going to interpose her own opinions or inclinations, despite the law requiring her to do so. However, our supreme court has also stated that appellate courts will not presume that the trial court did not exercise its discretion in ordering consecutive sentences unless there is some indication otherwise. *Urquhart v. State*, 273 Ark. 486, 621 S.W2d 218 (1981). *See also Blagg v. State*, 72 Ark. App. 32, 31 S.W.3d 872 (2000). In *Teague*

v. State, 328 Ark. 724, 946 S.W.2d 670 (1997), our supreme court held that the trial judge's statement that it was sentencing the defendant "in keeping with the verdict and recommendation of the jury" did not indicate the failure of the court to exercise discretion. Appellant argues the distinction here is that the judge's comments do, in fact, indicate that she was not exercising her discretion.

The State responds initially that appellant has failed to preserve the issue regarding the jury instruction because he failed to proffer a written instruction that contained the wording he was requesting. *See Osborne v. State*, 94 Ark. App. 337, 230 S.W.3d 290 (2006). We agree that appellant failed to meet that requirement; however, we also hold that the instruction given was acceptable. It clearly indicated that the circuit court was not bound by the jury's recommendation. Additionally, the form that was provided to, and returned by, the jury was AMCI–2nd form 9318-VF, which provides a jury three options: all terms consecutive, no terms consecutive, and some specified terms consecutive. We affirm with respect to the instruction given.

The argument regarding the exercise of discretion by the circuit court, or the lack thereof, with respect to sentencing is the closest of the issues presented on appeal. A trial court may reduce the extent or duration of the punishment assessed by the jury if, in the judge's opinion, the conviction is proper but the punishment assessed is still greater than, under the circumstances of the case, ought to be inflicted, as long as the punishment is not reduced below the limit prescribed by the law. *Ford v. State*, 99 Ark. App. 119, __ S.W.3d __ (2007). Here, the circuit judge asked appellant and his counsel for any additional

arguments or statements they wished to make prior to the pronouncement of the sentence; however, it was not until after the pronouncement that counsel asked the circuit judge to run the sentences concurrently. The State asserts that the judge specifically exercised discretion at that point, determining that the sentences should not, in effect, be reduced by running them concurrently.

Appellant had previously been convicted for three felonies, which exposed him to even higher sentences, but the jury sentenced him to the minimum sentences. The State argues that to have run the four sentences concurrently would not have adequately punished appellant for the serious crimes committed. The State also points out that the circuit judge specifically commented that, with meritorious good time, the consecutive running of the sentences would create an effective sentence of twelve years. Although the initial comment by the circuit judge falls short of unequivocally indicating that she was not relying solely on the jury's recommendation and was exercising her discretion, upon further review, we hold that the circuit judge considered and accepted the jury's recommendation in the case at bar, which was within her authority to do, and there is no clear indication that the judge's discretion was not properly exercised. We affirm with respect to this issue as well.

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.